No. SC97330

In the Supreme Court of Missouri

RONALD JOHNSON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from St. Louis City Circuit Court
Twenty-Second Judicial Circuit
The Honorable Steven Ohmer, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Ronald Johnson is appealing the denial of his Rule 24.035 motion which sought to vacate his guilty plea and sentence for one count each of murder in the first degree, section 565.020, RSMo, and robbery in the first degree, section 569.020, RSMo; and two counts of armed criminal action, section 571.015, RSMo.[1] (L.F. 170-73). Appellant entered a guilty plea on August 10, 2010, before Judge Steven Ohmer. (L.F. 12, 38).

Appellant told the court that he understood the charges against him and that he had had sufficient time to discuss the case with his attorney. (L.F. 39). Appellant told the court that he was twenty-two years old and had a tenth grade education. (L.F. 39). Since leaving school, Appellant had done "temp service" work and also received a disability check for "slow learning." (L.F. 39). Appellant said that he fully understood the proceedings. (L.F. 40). He denied being under the influence of any drug, alcohol, or medication. (L.F. 40). He also denied having any mental problems other than slow learning. (L.F. 40). Appellant again stated that he understood the proceedings and understood what he was doing. (L.F. 40).

The court discussed the rights attendant to trial and informed Appellant that his guilty plea waived those rights. (L.F. 40). Appellant said

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[1] All statutory references are to RSMo 2000 unless otherwise indicated.

that he understood and that he still wished to plead guilty. (L.F. 40). The prosecutor then gave the following summary of the State's evidence:

> Judge, had this matter gone to trial, the state would have proven beyond a reasonable doubt, with readily available witnesses and competent evidence that between March 6, 2008, and March 8, 2008, here in the City of St. Louis, specifically at the home of Cleophus King at 5726 Waterman, the defendant, acting with Cleophus King, knowingly caused the death of Luke Meiners, a friend and acquaintance of Ronald Johnson, that they caused Mr. Meiner's death by strangling, stabbing, and beating him, and that they used a knife, multiple knives, weapons, and an extension cord on Mr. Meiners.
>
> In the course of that, that the defendant, acting with Cleophus King, stole and robbed Mr. Meiners of his wallet, keys to his jeep, and that they subsequently went and took those items and the victim's jeep and used the victim's credit cards contained within his wallet to purchase items.
>
> And that after killing Mr. Meiners that night, they took his body, wrapped him up and dumped him over in Illinois.

(L.F. 40-41). Appellant agreed that the facts recited by the prosecutor were correct. (L.F. 41).

Appellant denied that any threats or promises had been made to induce him to plead guilty. (L.F. 41). He told the court that he was pleading guilty of his own free will. (L.F. 41).

The prosecutor explained the range of punishment for the offenses. (L.F. 41). Appellant said that he understood those ranges. (L.F. 41). The prosecutor announced that the plea deal was for the State to recommend concurrent sentences of life without parole for murder and ten years each on the remaining counts. (L.F. 41). The State also agreed not to seek the death penalty in exchange for his agreement to testify against Cleophus King in any court cases involving the death of Luke Meiners. (L.F. 44). Appellant said that he understood the agreement and did not have any questions about it. (L.F. 41).

When asked about his satisfaction with counsel, Appellant said that there was much that counsel could not do because he was waiting to see what was going to happen. (L.F. 41). Appellant added, "[B]ut I was just rushing him." (L.F. 41). Appellant said that counsel had done what he had been asked to do, and he expressed satisfaction with counsel's services. (L.F. 41).

When asked if he had any further questions, Appellant replied in the negative. (L.F. 41). The court accepted the plea of guilty, finding that it had been made voluntarily and with understanding. (L.F. 41). Sentencing was deferred until after Cleophus King's trial, since the State's agreement not to

seek the death penalty was contingent on Appellant testifying in that case. (L.F. 41-42).

Appellant sent requests to withdraw his guilty plea to the plea court on September 17, 2010, and December 7, 2010. (L.F. 11, 12). He appeared at a hearing on February 22, 2011, and said that he did not want to testify against King. (L.F. 8-9). The State then filed an oral motion to withdraw the plea agreement. (L.F. 9).

At a subsequent hearing on that motion, the State presented testimony from an inmate at the St. Louis City Justice Center who said that he had heard Cleophus King discuss plans to have Appellant change his testimony when he got on the stand. (L.F. 47). King also discussed having the prosecutor killed. (L.F. 47-48). The inmate testified that he passed notes from King to Appellant, and was aware that Appellant had passed notes to King. (L.F. 48). The inmate testified that he had talked to Appellant about Appellant's plan to switch sides, and that Appellant was undecided as to what to do. (L.F. 51). The State also introduced into evidence a recording where Appellant had admitted to authorities that he had been involved in a conspiracy with King. (L.F. 53-55). Appellant testified that he was still willing to testify against King in compliance with the plea agreement. (L.F. 56). The court denied the State's motion to withdraw the plea. (L.F. 4).

Appellant was sentenced on December 19, 2012, to concurrent sentences of life without parole for murder in the first degree, and ten years each on the count of robbery in the first degree and the two counts of armed criminal action. (L.F. 3, 36).

Appellant filed a pro se Motion to Vacate, Set Aside, or Correct the Judgment or Sentence on June 6, 2013. (L.F. 74, 75-82). Counsel was appointed on July 16, 2013, and was granted an additional thirty days to file an amended motion. (L.F. 73-74, 83-84, 86-87). The plea and sentencing transcripts were filed on December 18, 2013. (L.F. 73). Appointed counsel timely filed an amended motion on March 18, 2014. (L.F. 72, 89-124).

The amended motion raised three claims for relief: (1) that Appellant was coerced to plead guilty based on a threat of receiving the death penalty when he was ineligible for that punishment because he suffers from intellectual disability; (2) that counsel was ineffective for failing to challenge a State-conducted competency evaluation and for not requesting an independent evaluation; and (3) that Appellant was not competent at the time of his plea and will never become competent. (L.F. 95-97). The court denied the motion following an evidentiary hearing. (L.F. 66-67, 160-67).

STANDARD OF REVIEW

All of Appellant's points allege that the motion court clearly erred in denying the amended Rule 24.035 motion following an evidentiary hearing, with Points I and II alleging that Appellant received ineffective assistance of counsel. The following standard of review applies to each of Appellant's points.

Appellate review of the denial of a Rule 24.035 motion is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous. *Roberts v. State*, 276 S.W.3d 833, 835 (Mo. 2009); Supreme Court Rule 24.035(k). The motion court's findings are clearly erroneous only if, after reviewing the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. *Roberts*, 276 S.W.3d at 835. Appellant has the burden to show by a preponderance of the evidence that the motion court clearly erred in its ruling. *Id.* The motion court's findings should be upheld if they are sustainable on any grounds. *Swallow v. State*, 398 S.W.3d 1, 3 (Mo. 2013).

A claim of ineffective assistance of counsel requires a showing that counsel's representation fell below an objective standard of reasonableness and that, as a result, the movant was prejudiced. *Roberts*, 276 S.W.3d at 836. If a conviction results from a guilty plea, any claim of ineffective assistance of counsel is immaterial except to the extent that it impinges on the

voluntariness and knowledge with which the guilty plea was made. *Id.* A Rule 24.035 movant must therefore show that, but for the challenged conduct of plea counsel, he would not have pled guilty but would instead have insisted on going to trial. *Id.*

ARGUMENT

I.

Appellant has failed to show that plea counsel coerced him into pleading guilty.

Appellant claims that plea counsel coerced him into pleading guilty to murder in the first degree by using the threat of the death penalty to induce his plea, even though Appellant's reported IQ score of 53 made him ineligible to receive the death penalty. But the credible evidence, as found by the motion court, was that counsel did not threaten Appellant with the death penalty, but instead advised him of the sentencing options. Appellant cannot show prejudice in any event as the evidence makes it substantially certain that he would been found guilty of first-degree murder if he had gone to trial and would have received the same life without parole sentence that he obtained by pleading guilty.

A. Underlying Facts.

The amended motion alleged that Appellant and his family informed plea counsel Cleveland Tyson that Appellant suffered from an intellectual disability.[2] (L.F. 98). The motion further alleged that Tyson informed

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[2] The cases, statutes, and jury instructions that are cited herein generally use the term "mental retardation." That term has fallen out of favor

Appellant that he would likely get the death penalty if he took his case to trial, and that Appellant believed that he could receive the death penalty. (L.F. 98). The motion went on to allege that Appellant was not eligible to be sentenced to death because an IQ test administered when he was ten years old showed that he had an IQ of 53. (L.F. 99). The motion alleged that Appellant was misled, misinformed, and coerced into accepting a life without parole sentence when that was the maximum sentence that he could have received at trial. (L.F. 100). The motion alleged that Appellant would have taken his case to trial if he had known that life without parole was the maximum sentence that he could have received. (L.F. 100).

Plea counsel Tyson testified that he had practiced criminal law since 1998. (Tr. 29). Tyson said that he requested a medical examination because he had received some educational records which indicated that Appellant might have some developmental issues. (Tr. 29-30). Those records and the report from the competency examination mentioned that Appellant had a full scale IQ of 53 when he was ten-years-old. (Tr. 30-31). Tyson reviewed the

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and has largely been replaced by the term "intellectual disability." Respondent will use the term "intellectual disability" with the understanding that it is synonymous with the term "mental retardation."

competency report and noted that it diagnosed Appellant with "mild mental retardation V borderline intellectual functioning." (Tr. 32).

Tyson said he did not believe that someone who suffers from an intellectual disability is eligible for the death penalty. (Tr. 32). He said that he did not discuss that issue with Appellant because he had been found to be close to intellectually disabled, but not to actually be intellectually disabled. (Tr. 32). Tyson also said that he did not believe Appellant to be intellectually disabled based on his interactions with him. (Tr. 33). When talking to Appellant, Tyson asked him if he could understand what was being said to him, and had Appellant repeat in his own words what Tyson was saying. (Tr. 38). Tyson said that the school records containing the IQ score from when Appellant was ten years old did not state that he suffered from an intellectual disability. (Tr. 34). Tyson said that his impression was that Appellant was developmentally slow. (Tr. 35).

Tyson denied advising Appellant to plead guilty. (Tr. 35-36). He said that he explained the charges and sentencing options to Appellant, including the possibility that he could be found eligible for the death penalty. (Tr. 36). But Tyson denied ever telling Appellant that he would get the death penalty if he were found guilty. (Tr. 37). Tyson said that it would have been extremely difficult to obtain a not guilty verdict in light of the fact that Appellant made a full confession and that the homicide was captured on an

audio recording. (Tr. 36-37). Tyson said that Appellant made the decision to plead guilty after having lengthy discussions with Tyson and with his family. (Tr. 37).

On cross-examination, Tyson said he did not have any problems communicating with Appellant, nor did he have concerns that Appellant did not understand what he was being told. (Tr. 40-41). Tyson noted that Appellant was able to clearly articulate his position about various issues, including through numerous letters he wrote from jail, some of which were addressed to the court. (Tr. 41). Tyson agreed that many of those letters reflected that Appellant was weighing decisions and rationally deciding the best option. (Tr. 41). Tyson also acknowledged that a finding of intellectual disability had to be made by a judge or jury and was not automatic. (Tr. 42).

Washington University neurology professor and clinical psychologist Robert Fucetola assessed Appellant in March of 2014 and diagnosed him with mild intellectual disability, with an IQ score of 63. (Tr. 51-54). Fucetola testified that IQ scores measured in childhood would not be as stable as IQ scores measured in an adult. (Tr. 65).

Appellant testified that he had been given a mental health diagnosis, but could not recall what it was. (Tr. 72). When asked if he had discussed that subject with Tyson, Appellant responded that he "explained everything to my family and also explained some things to him also." (Tr. 73). Appellant

could not recall a doctor calling him intellectually disabled. (Tr. 73). Appellant said that Tyson told him that he would get the death penalty if he stood trial. (Tr. 74). He said that Tyson did not talk to him about the effect on the death penalty of having an intellectual disability. (Tr. 74). Appellant said that he pled guilty to avoid the death penalty and would not have pled guilty if he had been told that being intellectually disabled meant he could not get the death penalty. (Tr. 74). Appellant acknowledged on cross-examination that even if the death penalty was not an option, he was serving the same life without parole sentence that he would have received following a guilty verdict at trial. (Tr. 75).

The motion court determined that Appellant's claim was without merit. (L.F. 165). The court found that the plea agreement was the only guarantee that the death penalty was off the table, and that it was sound trial strategy to avoid the risk of a death sentence. (L.F. 165). The court noted that the murder was exceptionally brutal and the State's evidence was considerably strong. (L.F. 165). The motion court found Tyson to be a credible and competent attorney. (L.F. 166).

B. Analysis.

The Eighth Amendment prohibits sentencing an intellectually disabled person to death. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). The Supreme Court left it to the states to develop appropriate standards for enforcing that

restriction. *Id.* at 317. Prior to *Atkins*, Missouri law permitted the issue of intellectual disability to be submitted to the jury, or decided by the court prior to trial if the parties consented. § 565.030.4-.5, RSMo Cum. Supp. 2001. The statute defines intellectual disability as follows:

> [A] condition involving substantial limitations in general functioning, characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

§ 565.030.6, RSMo Cum. Supp. 2001. When the issue is submitted to the jury, it is given an instruction containing the statutory language. MAI-CR 3d 314.38 (Sept. 1, 2003).[3] The jury is also instructed that it must unanimously find by a preponderance of the evidence that the defendant is intellectually disabled. *Id.* The defendant has the burden of proving intellectual disability

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[3] The same language is utilized in the instruction that became effective on July 1, 2018. MAI-CR 4th 414.38.

by a preponderance of the evidence. *State v. Johnson*, 244 S.W.3d 144, 151 (Mo. 2008).

In denying the claim, the motion court necessarily rejected Appellant's testimony that counsel Tyson told him that he would get the death penalty if he went to trial, in favor of Tyson's credible testimony that he merely discussed the various sentencing options with Appellant, but did not advise him to plead guilty and did not tell him that he would receive the death penalty if he went to trial. (L.F. 166). It is a plea counsel's duty to explain to a defendant the range of punishment and that the defendant might receive a greater sentence if he does not plead guilty but insists on going to trial. *Gales v. State*, 533 S.W.3d 796, 800 (Mo. App. E.D. 2017). Mere prediction or advice of counsel regarding the possible sentence does not lead to a finding of legal coercion such that would render a guilty plea involuntary. *Id.*

Appellant's claim relies on his contention that he was categorically ineligible for the death sentence. But counsel correctly noted at the evidentiary hearing that a finding of intellectual disability has to be made by a judge or jury and is not automatic. (Tr. 42). The Supreme Court requires that intellectual disability determinations be informed by the medical community's diagnostic framework, but that the views of medical experts do not dictate a court's conclusion or demand adherence to everything stated in the latest medical guide. *Hall v. Florida*, 572 U.S. 701, 721 (2014); *Moore v.*

Texas, 137 S. Ct. 1039, 1049 (2017). The latest edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM) that is in force at the time of the intellectual disability determination helps supply that diagnostic framework. *Moore*, 137 S. Ct. at 1053. The version in force at the time Appellant entered his guilty plea was the DSM-IV, which was also utilized in Dr. Fucetola's evaluation.[4] (State Psych. Rpt., p. 17; Movant's Ex. 3, p. 12).

While the DSM-IV states that a person with an IQ of 70 or lower is generally considered to have sub-average intellectual functioning, it goes on to state that intellectual disability would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning. *Goodwin v. State*, 191 S.W.3d 20, 31 n.7 (Mo. 2006). An IQ test alone is thus not conclusive on the question of intellectual disability under the medical community's diagnostic framework.

The evidence available when Appellant pled guilty could have persuaded a jury to find him intellectually disabled if he had taken his case to trial. But had the case gone to trial and the question of intellectual disability been contested, it is possible that the State would have been able to

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[4] American Psychiatric Association, DSM History, accessed at https://www.psychiatry.org/psychiatrists/practice/dsm/history-of-the-dsm, on December 6, 2018.

develop competent evidence to rebut Appellant's evidence. A finding of intellectual disability was not a given at the time Appellant decided to enter his plea. The motion court thus did not clearly err in finding that a guilty plea was the only guaranteed way for Appellant to avoid the death penalty.

Even if counsel's performance is found to be deficient, Appellant cannot show that he was prejudiced. Appellant did plead and testify that he would not have pled guilty and would have gone to trial if he had known that he could not receive the death penalty. But that is not sufficient to establish prejudice under the circumstances. Section 565.020, RSMo, mandates that first-degree murder shall be punishable by either death or life imprisonment. *Thurman v. State*, 424 S.W.3d 456, 461 (Mo. App. E.D. 2014). Therefore, even if Appellant received a pre-trial determination that he suffered from an intellectual disability, life imprisonment without parole was the only sentence available to Appellant if he were found guilty at trial. *Id.* The Eastern District noted in *Thurman* the evidence in the record that Thurman had confessed to the crime and made other incriminating statements to law enforcement officers. *Id.* Based on that evidence, this Court concluded that it was not firmly convinced that the outcome of the trial would have been any

different such that Thurman was prejudiced by counsel's recommendations to plead guilty.[5] *Id.*

The motion court in this case likewise noted the strong evidence in this case. (L.F. 165). That evidence included Appellant's confession to police, the fact that the crime was caught on an audio recording, and Appellant's use of the victim's credit cards after the murder. (L.F. 161). Counsel Tyson noted that the evidence made it extremely unlikely that a jury would have returned anything other than a guilty verdict for first-degree murder. (Tr. 36-37). The record of this case does not demonstrate a reasonable probability of a different outcome at trial such that Appellant can be said to have suffered prejudice as a result of pleading guilty. Appellant's point should be denied.

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[5] While Appellant tries to distinguish *Thurman's* findings by describing the case as one of procedural default, a careful reading of the opinion shows that the court treated the prejudice issue as if it had been properly pled by the movant. *Id.*

II.

Trial counsel was not ineffective for failing to challenge the court-ordered competency report.

Appellant claims that counsel was ineffective for failing to challenge the sufficiency of the mental examination conducted to determine his competency to plead guilty. But counsel's reliance on the report was reasonable, and Appellant has failed to show that he was prejudiced by counsel's actions.

A. Underlying Facts.

A mental examination of Appellant under sections 552.020 and 552.030, RSMo, was ordered on July 16, 2009. (L.F. 16-17). A report of the examination was filed on March 18, 2010. (L.F. 15).

The amended Rule 24.035 motion alleged that plea counsel was ineffective for failing to object to the court-ordered psychological examination and for failing to ask for an independent "properly conducted" evaluation. (L.F. 101-02). The motion alleged that plea counsel Tyson requested a mental examination under sections 552.020 and 552.030, RSMo, on July 21, 2009. (L.F. 102). The motion alleged that Dr. Michael Armour wrote the evaluation and delivered it to the court on March 12, 2010. (L.F. 102). He concluded that Appellant's level of functioning did not rise to the level of mental disease or defect. (L.F. 103). The motion faulted Dr. Armour for not conducting any

psychological testing, but instead for basing his conclusions on a review of records and an interview of Appellant. (L.F. 102-03). The motion alleged that Appellant was prejudiced because he was not competent to enter his guilty pleas. (L.F. 107).

Appellant presented testimony at the Rule 24.035 evidentiary hearing from Patricia Zapf, a forensic psychologist and professor at John Jay College of Criminal Justice in New York City. (Tr. 4). Zapf conducted a mental health examination of Appellant at the request of the public defender's office. (Tr. 7).

She testified that three types of data need to be collected for a competency evaluation. (Tr. 10). One is data from an interview with the defendant. (Tr. 10). Second is records from or interviews with third party sources. (Tr. 10). Third is testing. (Tr. 10). Zapf testified that an interviewer who knows that a defendant has been diagnosed with an intellectual disability should use specific questioning techniques to ensure that the defendant understands what is being asked and can have a factual as well as rational understanding of the court-related proceedings. (Tr. 10-11).

Zapf testified that she was also retained to review the mental exam of Appellant that was conducted by Dr. Armour in 2010. (Tr. 12). Zapf expressed the opinion that the exam did not meet professional standards. (Tr. 12). She criticized Dr. Armour for not performing independent testing and for disregarding data collected in previous testing. (Tr. 12-13). Zapf said that Dr.

Armour's report also did not reflect that he took any special precautions for interviewing someone with an intellectual disability. (Tr. 13-14). Zapf also criticized the report for focusing on factual understanding and not evaluating rational understanding and decision making. (Tr. 14). Zapf opined that Dr. Armour's questions were not sufficient to gauge if Appellant was able to make an informed decision on how to plead. (Tr. 15).

Zapf admitted on cross-examination that she had not talked to Dr. Armour to determine whether he had actually taken the steps that she testified were missing from his evaluation. (Tr. 20). Zapf testified that she expected defense attorneys to rely upon the reports that she wrote. (Tr. 20).

Washington University neurology professor and clinical psychologist Robert Fucetola also reviewed Dr. Armour's report and found it insufficient. (Tr. 68). One of the concerns he had was that Dr. Armour did not assess Appellant's IQ, but nevertheless gave an opinion that Appellant's intellectual disability was not severe enough to render him incompetent to proceed. (Tr. 68). Fucetola also was concerned that the report did not document any measurement or evaluation of Appellant's capacity to assist his attorney or have a rational understanding of the charges against him. (Tr. 69). Fucetola admitted on cross-examination that he expected attorneys reviewing his evaluation reports to rely on his expertise. (Tr. 69).

Plea counsel Tyson testified that he did not do any research on the standards for conducting mental examinations. (Tr. 35). Tyson said he never considered challenging the mental examination in this case. (Tr. 35). Tyson testified on cross-examination that he had been a prosecutor and defense counsel and had read or requested many psychological exams. (Tr. 39). Tyson said that almost all of those reports had come from the Department of Mental Health, and that he had never had any reason to question the quality of those reports. (Tr. 39). Tyson said that there had been times he would seek a private evaluation if he did not like the results of a DMH evaluation, but he did not see that as necessary in Appellant's case. (Tr. 40).

The motion court denied the claim, noting counsel's testimony that his interactions with Appellant aligned with Dr. Armour's findings, leading him to trust Dr. Armour's report and not seek a second evaluation. (L.F. 165). The court found that Dr. Armour was a very competent and respected professional in his field, and that it was reasonable for counsel to rely upon his evaluation. (L.F. 165-66). The court found that the evidence presented by Dr. Zapf and Dr. Fucetola was insufficient to overcome Dr. Armour's conclusions. (L.F. 166).

B. Analysis.

In a criminal case, the issue of competency to proceed is a preliminary one and is exclusively for the trial court to determine. *Baird v. State*, 906

S.W.2d 746, 749 (Mo. App. W.D. 1995). The reasonableness of counsel's conduct is viewed from counsel's perspective at the time, eliminating hindsight from consideration. *Id.* Absent perceived shortcomings in the mental evaluation report or any manifestation of mental disease or defect not identified by prior reports, the attorney representing the defendant in a criminal case is not compelled to seek further evaluation. *Id.* (citing *Gooden v. State*, 846 S.W.2d 214, 218 (Mo. App. S.D. 1993)). Appellant had the burden of proving the assertion that a second mental evaluation was necessary and that by not receiving a second examination, he was denied effective assistance of counsel. *Gooden*, 846 S.W.2d at 218.

Plea counsel Tyson testified that he had extensive experience dealing with mental evaluations prepared by the Department of Mental Health, and that he had never had any reason to question the quality of those reports. (Tr. 35, 39). Tyson said that there had been times he would seek a private evaluation if he did not like the results of a DMH evaluation, but he did not see that as necessary in Appellant's case. (Tr. 40). The motion court found that the DMH examiner, Dr. Armour, was a very competent and respected professional in his field, and that it was reasonable for counsel to rely upon his evaluation. (L.F. 165-66).

The motion court further noted counsel's testimony that his interactions with Appellant aligned with Dr. Armour's findings, leading him

to trust Dr. Armour's report and not seek a second evaluation. (L.F. 165). In *Gooden*, the Court cited plea counsel's testimony at the evidentiary hearing that he had no question in his mind that the defendant was competent to plead guilty, and that he had available at the time of the plea a mental evaluation conducted by someone whom counsel believed to be credible. *Gooden*, 846 S.W.2d at 218. The court found that counsel's decision not to seek a second evaluation was reasonable under the facts of the case and did not constitute ineffective assistance of counsel. *Id.*

Appellant claims, without citing to any authority, that an attorney experienced in litigating mental health cases should have recognized deficiencies in Dr. Armour's report. But Appellant's experts both testified that they expected attorneys to rely on the reports they wrote. (Tr. 20, 69). While both experts criticized Dr. Armour's techniques, that testimony was based solely on the contents of his report, with Dr. Zapf admitting that she had not talked to Dr. Armour to determine exactly how he had conducted his testing. (Tr. 20). The motion court was not required to believe the testimony of either of Appellant's experts, and by its findings indicated that it did not. *Simmons v. State*, 429 S.W.3d 464, 466 (Mo. App. E.D. 2014).

Furthermore, Appellant failed to demonstrate that the professional standards that his witnesses testified to in 2017 were the same standards being employed in 2010, when Dr. Armour conducted his evaluation and

prepared his report. For instance, one of Dr. Zapf's criticisms of Dr. Armour was his evaluation of factual understanding without also evaluating rational understanding or decision making understanding. (Tr. 18). Dr. Zapf testified that "*It is no longer the case* that competency is just knowing the names of the court – the court personnel and what they do." (Tr. 18) (emphasis added). That testimony suggests that the standard for evaluating competency had changed over time, and begs the question of when that particular change occurred.

Appellant has also failed to establish his claim that he was prejudiced by counsel's performance because he would have been found not competent to stand trial or plead guilty. *Zink v. State*, 278 S.W.3d 170, 185 (Mo. 2009). The motion court found that the evidence presented by Appellant's expert witnesses was insufficient to overcome Dr. Armour's conclusion that Appellant was competent to proceed. (L.F. 166). In other words, the court found Appellant's witnesses unpersuasive. The motion court is free to believe or disbelieve any evidence, whether contradicted or not, and as such, this Court grants deference to the motion court's credibility determinations. *Simmons*, 429 S.W.3d at 466.

That deference is especially warranted in this case since the motion court was also the trial court, and would have been responsible for assessing the adequacy of Dr. Armour's report and determining how much weight to

give it. The court also had the opportunity to observe Appellant at several points during the case, including both the plea hearing and the post-conviction evidentiary hearing. *See Zink*, 278 S.W.3d at 185 (motion court relied on its own observations of the defendant to determine that he was competent). The fact that the court accepted Appellant's guilty plea was equivalent to a determination of his mental competency to proceed. *Baird*, 906 S.W.2d at 750. A trial court's determination of competence is a factual finding and some level of deference is owed to such a finding. *Id.* A post-conviction proceeding is not a forum to relitigate issues of fact that have been properly determined. *Id.* Appellant's point should be denied.

III.

Appellant has failed to establish that he was not, and never can be, competent to plead guilty.

Appellant claims that he was not competent to plead guilty due to his mental disabilities and can never be competent to do so. But the motion court found that Appellant's evidence was unpersuasive and did not overcome the court-ordered evaluation made closer in time to the guilty plea that found that Appellant was competent to proceed. That credibility finding is entitled to deference by this Court.

A. Underlying Facts.

The amended motion alleged that Appellant's guilty plea was not voluntary, knowing, and intelligent, because his intellectual disability left him incompetent to understand the proceedings against him or to assist in his own defense. (L.F. 109-10). The motion alleged that plea counsel Tyson should have conducted an independent investigation into Appellant's psychiatric and social history, should have ordered a private forensic evaluation, and should have discovered that Appellant was not competent to plead guilty. (L.F. 117-18).

Washington University neurology professor and clinical psychologist Robert Fucetola assessed Appellant's cognitive and intellectual functioning in March of 2014. (Tr. 51-52). Fucetola said that he reviewed relevant records

from several sources, interviewed Appellant and one of his sisters, and administered standardized tests. (Tr. 52-53). Fucetola diagnosed Appellant with mild intellectual disability, which he described as a permanent condition. (Tr. 53-54). Fucetola's testing of Appellant disclosed an IQ score of 63. (Tr. 54). Fucetola testified that the records he reviewed contained strong evidence that Appellant had been mildly intellectually disabled throughout his life. (Tr. 56-57). Fucetola testified that he was familiar with the standards for legal competency in Missouri, and that Appellant could not meet those standards. (Tr. 55). Fucetola said that Appellant could talk to his attorney but could not assist his attorney in a rational way. (Tr. 55-56). Fucetola said that Appellant's competency was also affected by his diagnosis of paranoid schizophrenia. (Tr. 60).

The motion court questioned Appellant at the Rule 24.035 evidentiary hearing. (Tr. 78). Appellant acknowledged that many conversations had taken place between he and the court, including letters that Appellant wrote to the court. (Tr. 78). Appellant said that he never had any problem communicating with the court, and that the court did its best to address those concerns. (Tr. 78-79). The court said that it was not aware of any problems, and Appellant agreed. (Tr. 79-80).

The motion court found that the evidence presented by Dr. Fucetola was insufficient to overcome Dr. Armour's conclusion that Appellant was

competent to plead guilty. (L.F. 166). The court further found that each and every claim asserted in the amended motion lacked merit, and that Appellant had failed to meet his burden of showing by a preponderance of the evidence that he was entitled to relief. (L.F. 166).

B. Analysis.

A plea must be a voluntary expression of the defendant's choice and a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences of the acts. *Wills v. State*, 321 S.W.3d 375, 379 (Mo. App. W.D. 2010). Due process requires that a person who wishes to plead guilty must be competent to do so and must enter the plea knowingly and voluntarily. *Id.*

To be competent to plead guilty, a defendant had to have sufficient present ability to consult with his attorneys with a reasonable degree of rational and factual understanding of the proceedings against him. *Id.* Some degree of intellectual disability does not automatically render a defendant incapable of entering a voluntary plea of guilty. *Id.*

Appellant's claim of incompetency is based solely on Dr. Fucetola's testimony at the Rule 24.035 evidentiary hearing. The motion court found that Dr. Fucetola's testimony was insufficient to overcome Dr. Armour's conclusion, made closer in time to the plea, that Appellant was competent to proceed. (L.F. 166). In other words, the court found Dr. Fucetola's testimony

unpersuasive. The motion court is free to believe or disbelieve any evidence, whether contradicted or not, and as such, this Court grants deference to the motion court's credibility determinations. *Simmons*, 429 S.W.3d at 466.

That deference is especially warranted in this case since the motion court was also the trial court, and would have been responsible for assessing the adequacy of Dr. Armour's report and determining how much weight to give it. The court also had the opportunity to observe Appellant at several points during the case, including both the plea hearing and the post-conviction evidentiary hearing. *See Zink*, 278 S.W.3d at 185 (motion court relied on its own observations of the defendant to determine that he was competent). The fact that the court accepted Appellant's guilty plea was equivalent to a determination of his mental competency to proceed. *Baird*, 906 S.W.2d at 750. A trial court's determination of competence is a factual finding and some level of deference is owed to such a finding. *Id.* A post-conviction proceeding is not a forum to relitigate issues of fact that have been properly determined. *Id.* Appellant's point should be denied.

CONCLUSION

In view of the foregoing, Respondent submits that the denial of Appellant's Rule 24.035 motion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 6,456 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2016 software.

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